Supreme Court, U.S.
FILED
OCT 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-705

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

EMERSON MOLT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SAM ADAM
53 West Jackson Blvd.
Suite 1430
Chicago, Illinois 60604
(312) 236-5543

RALPH MABIE
Suite 802 Comeau Building
319 Clematis Street
West Palm Beach, Florida 33401
(305) 832-4332
Attorneys for Petitioner Molt.

The Scheffer Press, Inc.—(312) 263-6850

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QUESTION PRESENTED

1. Whether Petitioner was denied his Sixth Amendment guarantee to Confrontation when the trial court permitted the government to offer to the jury the alleged statements of alleged co-conspirators — pursuant to Federal Rule 801(d)(2)(E) — without a predicate showing of unavailability as required by *Ohio* v. *Roberts* (1980), 448 U.S. 56. [see *United States* v. *Inadi* (3rd Cir., 1984), 748 F.2d 812, *cert. granted* (1985), 105 S.Ct. 2653.]

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PRAYER

Petitioner, Emerson Molt, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion and Order of the United States Court of Appeals for the Seventh Circuit dated September 10, 1985 appears in Appendix A attached hereto. No Petition for Rehearing was filed. The judgment order and sentence of the United States District Court for the Northern District of Indiana, Hammond Division appears in Appendix B, attached hereto.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 10, 1985. Petitioner filed no Petition for Rehearing. This Petition is filed within sixty (60) days of said ruling of the United States Court of Appeals for the Seventh Circuit, and jurisdiction is invoked under 28 U.S.C., Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

Petitioner, Emerson Molt, was convicted of conspiring to import and to possess with intent to distribute marijuana and cocaine. Though the indictment charged Petitioner and forty others with this conspiracy, Petitioner was tried alone. The principal evidence against Petitioner consisted of the testimony of five of the co-conspirators, and a great deal of their testimony related to alleged conversations years before, many of which were out of the defendant's presence and all of which were objected to by Petitioner. Upon Petitioner's conviction, the court sentenced Petitioner to a total of eight years' imprisonment.

REASONS FOR GRANTING THE WRIT

The principal evidence against Petitioner consisted of the testimony of five witnesses, all of whom related in extensive detail alleged conspiratorial statements made by alleged co-conspirators years before, most of which were not even purported to have been made in the presence of the Petitioner. These were admitted by the court, over Petitioner's specific objections, pursuant to Rule 801 (d)(2)(E) of the Federal Rules of Criminal Procedure which provides:

> "A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."

Thus the out-of-court statements by the out-of-court declarants were not, by definition, "hearsay." But the Sixth Amendment provides that:

> "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Ohio* v. *Roberts* (1980), 448 U.S. 56, at 65, this Court said:

> "in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment established a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."

The government in the instant prosecution made no effort whatsoever to show that the out-of-court declarants were "unavailable." Indeed, as the instant cause and many others demonstrate, the rule is well established that in the Seventh Circuit no such predicate showing is required. (See Appendix A, page 3a). But these Seventh Circuit holdings directly conflict with those of the Third Circuit Court of Appeals, and particularly *United States* v. *Inadi* (1984), 748 F.2d 812, *cert. granted*, 105 S.Ct. 2653, wherein that Court held, at page 819:

> "We therefore hold that the government must show that a non-testifying co-conspirator is *unavailable* to testify as a foundation for admitting that co-conspirator's out-of-court statements under Federal Rule of Evidence 801(d)(2)(E)." (Emphasis in original)

Judge Swygert, concurring below, (Appendix A, page 9a) while agreeing "with the reasoning of the Third Circuit in *United States* v. *Inadi* . . . (felt) constrained to follow the prior decisions of this Court which have adopted a contrary rule."

The majority below, fully recognizing the inter-circuit conflict, held:

> "Because the Court has granted review in *Inadi*, it is unnecessary for us to treat the matter fully. The Supreme Court will do that, and if Molt files a Petition for Certiorari he will get the benefit of any favorable decision. We do not think that a favorable decision in that forum is likely, however, and we therefore do not think that Molt should receive relief pending the Court's ruling." (Appendix A, page 3a.)

CONCLUSION

For the foregoing reasons, Petitioner, EMERSON MOLT, respectfully prays that this Honorable Court issue its writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

SAM ADAM
53 West Jackson Blvd.
Suite 1430
Chicago, Illinois 60604
(312) 236-5543

RALPH MABIE
Suite 802 Comeau Building
319 Clematis Street
West Palm Beach, Florida 33401
(305) 832-4332
Attorneys for Petitioner Molt.

APPENDICIES

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 84-3164

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EMERSON MOLT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 83 CR 36—MICHAEL S. KANNE, *Judge.*

ARGUED JUNE 4, 1985—DECIDED SEPTEMBER 10, 1985

Before CUDAHY and EASTERBROOK, *Circuit Judges,* and SWYGERT, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* An indictment charged Emerson "Bud" Molt and 40 others with conspiring to import and to possess with intent to distribute marijuana and cocaine. Ronald Markowski, the kingpin of the operation (see *United States v. Markowski,* No. 84-1874, also decided today), was tried separately. Others pleaded or were found guilty, fled, or were never captured. Molt was tried alone and convicted. One defendant remains to be tried.

The case against Molt consists principally of the testimony of five of the conspirators, four of whom placed Molt at meetings discussing drug smuggling operations or at the scene of specific importations. The evidence, properly taken in the light most favorable to the government, portrayed Molt as pilot, radio operator, off-loader, and factotum of a drug ring. Ronald Markowski, Frank Brady, and perhaps another were ringleaders. Brady owned land in Florida, which the smugglers used as a meeting place, and on Cat Island, Bahamas, which they used as a stopover on trips from Colombia. Molt was Brady's right-hand man and one of the pilots.

The normal course of operations was for Markowski or one of his partners or employees to fly marijuana or cocaine from Colombia to an airstrip in the Bahamas. The smugglers would either store the drugs there for later trips or take them by air immediately to Florida or Georgia. Other participants would transport the drugs to Northern Indiana for distribution there and in Chicago.

Molt's role was as coordinator on the ground in the Bahamas, where he made sure planes could land safely, refueled them, unloaded drugs, and reprovisioned other smugglers. He also took to the air as a "cover" pilot, looking out for surveillance and potential interference on the ground. Once he helped rescue a stranded smuggler. Some of the evidence shows Molt discussing the dates and times of smuggling operations. We need not recount the evidence more fully.

The court sentenced Molt to a total of eight years' imprisonment. He challenges the admission of co-conspirators' out-of-court statements, the finding that there was a single conspiracy, the conclusion that there was venue in Indiana, and the disposition of claims under the Jencks Act, 18 U.S.C. § 3500.

I

The five smugglers who testified against Molt recounted many conversations among other conspirators. Molt main-

tains that the admission of these statements violated the Confrontation Clause of the Sixth Amendment. A motions panel of the court found this argument unlikely to prevail and so denied Molt's application for bail pending appeal. *United States v. Molt,* 758 F.2d 1198 (7th Cir. 1985).

This court has held on many occasions that the only test for admissibility of a conspirator's out-of-court statement is whether the statement complies with Fed. R. Evid. 801(d)(2)(E). E.g., *United States v. Williams,* 737 F.2d 594, 610 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 1354 (1985); *United States v. Xheka,* 704 F.2d 974, 987 n.7 (7th Cir.), *cert. denied,* 104 S. Ct. 486 (1983); *Davis v. Franzen,* 671 F.2d 1056, 1058 (7th Cir. 1982). The statements admitted here complied with Rule 801(d)(2)(E). They were made during the conspiracy and in furtherance of its objectives. Molt urges us to reconsider our position in light of *United States v. Inadi,* 748 F.2d 812 (3d Cir. 1984), *cert. granted,* 105 S. Ct. 2653 (1985), which holds that the Sixth Amendment requires the government to show that the conspirator-declarants are unavailable before it may introduce their declarations through others. See also *United States v. Caputo,* 758 F.2d 944 (3d Cir. 1985).

Because the Court has granted review in *Inadi,* it is unnecessary for us to treat the matter fully. The Supreme Court will do that, and if Molt files a petition for certiorari he will get the benefit of any favorable decision. We do not think that a favorable decision in that forum is likely, however, and we therefore do not think that Molt should receive relief pending the Court's ruling.

The co-conspirator rule is an old one. See 4 J. Wigmore, *Evidence in Trials at Common Law* § 1079 (J. Chadbourn ed. 1972). The Court has allowed the use of hearsay, despite objections based on the Confrontation Clause, when it bore sufficient indicia of reliability. E.g., *Ohio v. Roberts,* 448 U.S. 56 (1980); *Mancusi v. Stubbs,* 408 U.S. 204, 213 (1972). The declarations of conspirators are usually reliable in the pertinent sense. They are contemporaneous

statements in an ongoing business relation. The person who reports these statements may be unreliable, but he is in court and may be cross-examined. If the witness recounts the statements accurately, there is no particular reason to doubt that the business arrangements among the conspirators are other than as the statements depict them.

The declarations are reliable in the same sense that contracts or negotiations among legitimate business partners usually portray accurately the affairs of those involved. They are acts as much as they are reports. They have value independent of the truth of the matter stated. These statements are not pale substitutes for live testimony about what the conspirators did; their value usually lies in the very fact that people said certain things on the spot to other conspirators. Testimony in court would not replicate what is important about the statements.

The Supreme Court twice has rebuffed objections under the Confrontation Clause to the use of co-conspirators' statements. See *Delaney v. United States,* 263 U.S. 586, 590 (1924), wich brusquely rejects a challenge to the traditional rule, and *Dutton v. Evans,* 400 U.S. 74 (1970), which sustains a state rule that admits evidence in addition to that permitted by the traditional formulation reflected in Rule 801(d)(2)(E). The Third Circuit said in *Inadi* that the Supreme Court had changed its mind. It relied on dictum in *Roberts,* 448 U.S. at 65, that in the "usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant . . . ." We do not think that the Court meant to repudiate *Delaney* and *Dutton,* which it did not mention in this passage. The opinion in *Roberts* went on to observe "the truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values' and 'stem from the same roots.'" 448 U.S. at 66 (citations omitted). Although the Court ultimately may agree with *Inadi,* the probability that it will overrule *Delaney* and *Dutton* is sufficiently small that we think Molt's conviction should stand in the interim.

As an aside, Molt argues that the statements admitted in this case were not "in furtherance" of any conspiracy. The argument is feeble. Molt does not point to any one statement inadmissible for this reason. Our review of the record turned up only conversations concerning planning or review of the drug ring's exploits. The district court correctly found that the conversations were admissible under Rule 801(d)(2)(E).

II

Molt makes related arguments concerning the scope of the conspiracy and the venue of the prosecution.

Molt says that the jury erroneously found that there was one conspiracy instead of several. He claims that each importation was a separate conspiracy because not all the same people participated in each importation. But whether there was one conspiracy or many is a question of fact for the jury's determination. *United States v. Schmucker-Bula*, 609 F.2d 399, 403 (7th Cir. 1980). The jury easily could have found a single conspiracy, occurring from 1977 through 1982, run by common leaders. Witnesses testified to the conspiracy's activities throughout this period. Three witnesses testified that Cat Island was a refueling spot for multiple importations of marijuana and cocaine. Four eyewitnesses identified Molt as pilot, refueler, and radio operator for Cat Island. The jury was instructed that it had to determine whether a single conspiracy existed from 1977 through 1982. We see no reason to set aside the jury's verdict on this issue.

The conclusion that there was but one conspiracy disposes of Molt's further argument about venue. Venue is proper in any district where an "offense was begun, continued, or completed." 18 U.S.C. § 3237(a). As long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there. *United States v. Brown*, 739 F.2d 1136, 1148 (7th Cir.), *cert. denied*, 105 S. Ct. 331 (1984); *United States v. Mayo*, 721 F.2d 1084, 1089-91 (7th Cir. 1983); *United States v. Lewis*, 676 F.2d 508, 511 (11th

Cir.), *cert. denied,* 459 U.S. 976 (1982); *United States* v. *Schmucker-Bula,* 609 F.2d at 402. Molt conceded at oral argument that if there was only one conspiracy, then venue was proper in the Northern District of Indiana.

The concession was appropriate, for the evidence establishes several overt acts in the Northern District of Indiana, the northern terminus of the smuggling operation. The drugs ultimately were transported into the district. The evidence also shows that Markowski flew a plane used in at least one smuggling trip from Gary, Indiana, to Valparaiso, Indiana, so that a conspirator could "sweep" the plane to detect electronic bugs. Another plane was inspected in LaPorte, Indiana. Markowski and another conspirator met in Gary, Indiana, to inspect a plane that had been used to smuggle marijuana. LaPorte, Gary, and Valparaiso are in the Northern District of Indiana. These and other overt acts in the district were all part of a five-year conspiracy to import and distribute drugs. The fact that Molt was never in the district is immaterial. *Brown,* 739 F.2d at 1148.

III

The final argument rests on the Jencks Act, 18 U.S.C. § 3500. The dispute here concerns witnesses' statements before law enforcement authorities and grand juries outside Indiana.

At trial two witnesses testified that they had spoken to Florida law enforcement authorities and had testified before a Florida state grand jury as well as a grand jury in the Northern District of Indiana. John Devoe, a third witness, recalled that he had testified before federal grand juries in Minneapolis-St. Paul, Boston, and South Bend, a state grand jury in Florida, and the Royal Bahamian Commission, and that he had spoken with agents of the FBI, DEA, and IRS. After Devoe testified, Molt's counsel objected that he had not obtained transcripts or notes of all of Devoe's statements. During argument on this motion,

the prosecutor stated that he had reviewed transcripts from Devoe's testimony before the Royal Bahamaian Commission and at federal trials in West Palm Beach and Minneapolis-St. Paul. The prosecutor represented that he had found almost nothing in those transcripts relating to the subjects Devoe had addressed in Molt's trial, but he gave Molt's counsel material in those transcripts relating to plea agreements and to Devoe's meeting with the conspiracy's Colombian cocaine supplier.

The prosecutor had another Assistant U.S. Attorney review Devoe's testimony before the Boston grand jury. The prosecutor certified that there was nothing in the transcript relating to Devoe's testimony on direct. The court granted Molt's counsel's request to question Devoe more specifically about earlier testimony and statements. Devoe stated that the first time he had told any federal or state official about the escapades involving Molt was a "couple days" before he testified against Molt. After this reply, Molt's counsel had no further comment on the Jencks Act issue until a post-trial motion for a new trial. He then protested only that he had not been given a continuance before trial, which he had requested in order to obtain witnesses' testimony before Florida state grand juries and the other conspirators' trials in the Northern District of Indiana. Molt did not raise a Jencks Act complaint with respect to any of Devoe's testimony before federal grand juries or statements to federal officials.

The argument about the continuance is empty. The Jencks Act provides that a government witness's statement or report shall not be available until after the witness has testified on direct examination. *United States* v. *Harris,* 542 F.2d 1283, 1291 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1977); 18 U.S.C. § 3500(a). Because the government was not required to give Molt any information before trial began, the court did not need to give Molt a continuance before trial. See *Harris,* 542 F.2d at 1293-94 (trial court should not delay trial to await preparation of trial transcripts).

The complaint that the government did not provide copies of witnesses' statements before Florida grand juries and non-federal investigating authorities is no better. The Jencks Act requires the government to produce only such material as it has. See § 3500(b); *Harris, supra,* 542 F.2d at 1292-93. Materials in the possession of state agencies are not within the scope of the Jencks Act. *United States* v. *Cagnina,* 697 F.2d 915, 922 (11th Cir.), *cert. denied,* 104 S. Ct. 175 (1983).

To the extent Molt is arguing that he should have received copies of witnesses' statements made to federal grand juries or investigators, his argument fails on the facts. Molt had transcripts of witnesses' testimony both before the Northern District of Indiana grand jury and at Markowski's trial in the same district. The only witness who spoke with or testified before federal authorities outside Indiana was John Devoe. Molt did not make the necessary motion (see § 3500(b)) with respect to Devoe. After Devoe finished testifying on direct examination, Molt's counsel complained as we described above. Under questioning Devoe said that he had never mentioned the activities involving Molt to any authority, state or federal, until approximately two days before he testified. At that time he spoke with the prosecutor at Molt's trial and a Michigan sheriff. Molt's counsel then stated, "I guess that takes care of 3500 material. Thank you, Your Honor." Molt's counsel was apparently satisfied, that no *Jencks* material existed for Devoe and never said anything further. Molt cannot now claim that the court erred by not conducting a full in camera examination of Devoe's grand jury or other statements.

AFFIRMED

SWYGERT, *Senior Circuit Judge,* concurring. Although I agree with the reasoning of the Third Circuit in *United States* v. *Inadi,* 748 F.2d 812 (3d Cir. 1984), *cert. granted,* 105 S.Ct. 2653 (1985), holding that the confrontation clause of the sixth amendment requires the government to show that a non-testifying coconspirator is unavailable to testify before his hearsay statements can be admitted pursuant to Fed.R.Evid. 801(d)2E, I am constrained to follow prior decisions of this court which have adopted a contrary rule. Moreover, as the majority holds, *see ante* at 4, the defendant can still obtain relief should the Supreme Court affirm *Inadi. See Shea* v. *Louisiana,* ..... U.S. ....., 105 S. Ct. 1065 (1985). I therefore concur in the affirmance of the conviction.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX "B"

EMERSON MOLTE — DOCKET NO. HCR 83-00036 (33)

JUDGMENT AND PROBATION/COMMITMENT ORDER (AO 245 (8/74))

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH DAY YEAR: December 14, 1984

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[XX] WITH COUNSEL Sam Adam and Ralph Mabie (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [XX] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [XX] GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to import controlled substances (marijuana and cocaine), in violation of Title 21, United States Code, sections 952(a) and 963 (Count III); and conspiracy to distribute controlled substances (marijuana and cocaine), in violation of Title 21, United States Code, section 846 (Count IV).

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) years and fined $25,000.00 as to Count III; and eight (8) years as to Count IV.

The sentence imposed in Count IV shall run concurrently with the sentence imposed in Count III.

IT IS FURTHER ORDERED that the defendant shall voluntarily surrender to the designated institution no later than 12:00 p.m. on January 11, 1985.

FILED
DEC 14 1984
RICHARD E. TIMMONS, CLERK
U.S. DISTRICT COURT

SPECIAL CONDITIONS OF PROBATION

77

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[XX] U.S. District Judge
[ ] U.S. Magistrate

Michael S. Kanne — Date 12-14-84

No. 85-705

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OCTOBER TERM, 1985

EMERSON MOLT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government was barred from introducing statements falling within the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), because it did not first establish that the declarants were unavailable to testify at trial.

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of conspiring to import marijuana and cocaine, in violation 21 U.S.C. 963, and of conspiring to possess those drugs with intent to distribute them, in violation of 21 U.S.C. 846. He was sentenced to concurrent eight-year terms of imprisonment on each count and a fine of $25,000. The court of appeals affirmed (Pet. App. 1a-9a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2a). It showed that petitioner was a participant in a drug smuggling enterprise headed by Ronald Markowski, Frank Brady, and perhaps one other person. Brady owned land in Florida, which the smugglers used as a meeting place, and on Cat Island, Bahamas, which they used as a stopover on trips from Colombia. The normal course of operation was for Markowski or one of his partners or employees to fly marijuana or cocaine from Colombia to an airstrip in the Bahamas. The smugglers would either immediately take the drugs by air to Florida or Georgia or store them in the Bahamas for later trips. Petitioner's role was as coordinator on the ground in the Bahamas, where he made sure that planes could land safely, refueled them, unloaded drugs, and reprovisioned other smugglers. He also took to the air as a "cover" pilot, looking out for surveillance and potential interference on the ground. On one occasion, he helped rescue a stranded smuggler.

2. The case against petitioner consisted principally of the testimony of five of his co-conspirators. As part of their testimony, these witnesses recounted many conversations among other co-conspirators. These statements were admitted under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Petitioner contends that the introduction of these statements violated the Confrontation Clause because the government did not show that the declarants were unavailable to testify at trial. The issue whether the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator rule unless it establishes the declarant's unavailability to testify at trial is currently before the Court in

United States v. *Inadi*, No. 84-1580 (argued Dec. 3, 1985). Accordingly, the instant petition should be held pending the decision in *Inadi* and disposed of as appropriate in light of that decision.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12